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No. 804

In the

Supreme Court of the United States

OCTOBER TERM, 1958

BERNICE COUCH, ET VIR., STERLING COUCH,
Petitioners,

v.

CITY OF RICHARDSON, GERTRUDE M. GILLESPIE,
Respondents.

Application for Writ of Certiorari to the Supreme Court of Texas

PETITION

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

Comes now, Bernice Couch, joined by her husband, Sterling Couch, and making application for a Writ of Certiorari to the Supreme Court of Texas, in the above entitled cause, respectfully show this Court as follows:

REPORTED OPINIONS

The opinions delivered by the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, affirming the Trial Court's Judgment and Denying Petitioners' Motion for Rehearing are reported in 313 S. W. 2d 949.

No opinion was rendered by the Supreme Court of Texas, other than "Writ Refused, N. R. E.", which is unreported.

JURISDICTION

The Judgment sought to be reviewed was rendered by the Supreme Court of Texas on November 11, 1958, and Motion for Rehearing thereon denied by that Court on December 31, 1958. The Supreme Court Judgment held that there was no reversible error committed by the Court of Civil Appeals in affirming the Judgment of the Trial Court entered April 11, 1957.

The Jurisdiction of this Court to review by Writ of Certiorari the Judgment entered in this cause is conferred by 28 U. S. C. 1257.

QUESTION PRESENTED

Is the Texas Courts' refusal to enforce valid Texas Statutes prohibiting acquisition of any interest in a public Street by adverse possession, or the closing thereof without an election, and the entry of a Judgment, based upon adverse possession and a City Ordinance passed after trial of the cause, which Judgment divested the Petitioners and the Respondent City of all rights in a public Street and vested fee simple title thereto by adverse possession in respondent Gillespie, a violation of Petitioners' rights of due process, equal protection of the laws and immunity from ex post facto legislation as guaranteed by the Constitution of the United States?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following provisions of law are involved in this case:

Constitution of the United States:

Article 1, Section 10. "No State shall * * * pass any * * * ex post facto law * * *."

Amendment V. "* * * nor shall any person * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment XIV. "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of the State of Texas—Appendix-25

Texas Statutes:

Article 1019, Revised Civil Statutes of the State of Texas, Volume 2A, Vernon's Texas Civil Statutes, Page 231:

"Art. 1019. Special Election

"No public square or park shall be sold, and no street or alley closed, until the question of such sale or closing has been submitted to a vote of the qualified voters of the City or town, and approved by a majority of the votes cast at such election."

Article 5517, Revised Civil Statutes of the State of Texas, Volume 16, Vernon's Texas Civil Statutes, Page 609:

> "Art. 5517. Right of the state, counties, cities and school districts
>
> "The right of the State, all counties, incorporated cities and all school districts shall not be barred by any of the provisions of this Title, nor shall any person ever acquire, by occupancy or adverse possession, any right or title to any part or portion of any road, street, alley, sidewalk, or grounds which belong to any town, city, or county, or which have been donated or dedicated for public use to any such town, city, or county by the owner thereof, or which have been laid out or dedicated in any manner to public use in any town, city, or county in this State."

STATEMENT OF THE CASE

The City of Richardson is an incorporated City in Dallas County, Texas. Dallas Street is a public street within said City by donation and dedication of the original donors of the land to the City. The Petitioners are the owners of land adjacent to and abutting on the said Dallas Street. The Respondent, Gertrude M. Gillespie, claimed title to a portion of Dallas Street abutting on and adjacent to the lands owned by the Petitioners.

The Petitioners instituted this action in the District Court of Dallas County, Texas, against the Respondents, praying for an adjudication of all Parties' rights in the aforementioned Dallas Street, with incidental injunctive relief. The City of Richardson filed a disclaimer to Peti-

titoners' action. The Respondent, Gillespie, answered claiming title to Dallas Street by virtue of a Deed to a predecessor in 1937, abandonment by the City by Ordinance passed in 1937, and adverse possession, raising such claims by a Cross-Action in Trespass to Try Title. The Petitioners defended said Cross-Action upon the basis of the quoted Texas Statutes, denial of abandonment and insufficiency of the Deed alleged to be the source of title.

Upon trial of the cause, the Court submitted to the Jury issues as to abandonment of the Street, and, over Petitioners' objection, issues as to Respondent Gillespie's adverse possession and as to whether Petitioners could be compensated in money for damages sustained. The Jury found that the Street had *not* been abandoned in 1937 as alleged by Respondent Gillespie, that Petitioners could be compensated in money for damages sustained, and that Respondent Gillespie and her predecessors in title had been in adverse possession of the portion of Dallas Street involved for ten years or more prior to commencement of this action.

The Jury rendered its verdict on April 6, 1956. In January 1957, eight months after the Jury Verdict, the Respondent City of Richardson passed an Ordinance attempting to vest title to the public street in the Respondent Gillespie and her predecessors in title, without consideration therefor.

The Respondent Gillespie moved for an interlocutory Judgment on the basis of the Ordinance referred to but that Motion was never acted upon by the Court. However,

one year and five days after the Jury verdict, the District Court entered Judgment vesting title in fee simple in Respondent Gillespie, and effectively divesting the City and the Petitioners of any and all right or interest in the portion of Dallas Street described in the Judgment, including Petitioners' private easement therein.

Petitioners urged the Application of the quoted Texas Statutes to the Trial Court, on Appeal to the Court of Civil Appeals and finally to the Supreme Court of Texas by their application for a Writ of Error. Upon denial of Petitioners' application to the Supreme Court for a Writ of Error, Petitioners by their Motion for Rehearing (Appendix 19) specifically raised the Federal Questions of the denial of due process, equal protection of the laws and immunity from ex post facto legislation, which Motion was denied without opinion on December 31, 1958.

ARGUMENT—SUBSTANTIAL QUESTION

The Appellate Courts' utter disregard of the issues raised by the pleadings, and creation of fanciful issues to distort the legal effect of the jury verdict, combined with their reliance upon an ordinance passed after trial of the case to sustain an invalid judgment is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Under Texas practice, the Trial Court is required to submit to the Jury only those questions of fact which are raised by the pleadings and proof in the cause on trial.

In the absence of legal objection it is presumed that all issues of fact have been properly submitted, and that facts material to the alleged cause of action are established as true unless issues be submitted relevant thereto. If the Plaintiff fails to prove such material facts then the Court is obligated to dismiss the Petition and there is no reason for a Jury Verdict. The foregoing rule of Judicial Process is so well established that citation of authority therefor is deemed unnecessary.

Applying this rule to the case at bar, the Petitioners alleged that Dallas Street was a dedicated City Street and that as purchasers of abutting lots they had a private and public easement therein. Petitioners pleaded Article 1019, supra, requiring a City election as a condition precedent to abandonment or closing of a public street, alleging none had been held. No issue was submitted to the Jury as to the truth of such allegations and both being material to the Plaintiffs' cause it is to be presumed that they were established by the proof. The Respondent Gillespie based her claim to title upon a deed to her predecessor in title in 1937 and abandonment of the street by the Respondent City of Richardson by ordinance in 1937. The Jury specifically found that the Street was not abandoned by Ordinance in 1937. (Plaintiffs' Petition—Record—District Court Tr. Page 16; Defendant's Answer and Cross-Action—Record—District Court Tr. Page 80; Jury Verdict—District Court Tr. Pages 136-138, Appendix 50.)

On the basis of the issues submitted to the Jury it must therefore be concluded that the Court found as a matter of